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JAMES R. BROWNING,

IN THE

# Supreme Court of the United States

OCTOBER TERM — 1959

No. 340

J. VIRGIL SCOTT, ET AL AND PAUL J. ROGERS, ET AL,
*Appellants,*

v.

UNION PRODUCING COMPANY, ET AL,
*Appellees.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM — 1959

No. .....

J. VIRGIL SCOTT, ET AL AND PAUL J. ROGERS, ET AL,
*Appellants,*

v.

UNION PRODUCING COMPANY, ET AL,
*Appellees.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Benjamin Clayton, R. S. Nixon, Nueces Royalty Company, a partnership, Paul J. Rogers, J. Virgil Scott and Erwin W. Smith pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on May 21, 1959.

### OPINIONS BELOW

The memorandum opinion of the District Court may be found at page 214 of the record, and the opinion of the Court of Appeals is included herein as Appendix A, infra.

A petition for rehearing was denied by the Court of Appeals without opinion.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1959. A petition for rehearing was denied on July 20, 1959. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals committed reversible error in affirming a judgment by the District Court granting a summary judgment to respondents, and in holding that as a matter of local law of the State of Texas, term mineral interests owned by petitioners and expiring by the terms thereof on October 25, 1955 in the absence of production of minerals, terminated and reverted to respondents on that date notwithstanding compliance with a lease provision covering all mineral interests here involved defining production to include the payment of shut-in royalties on a shut-in gas well.

2. Where a case involving the precise issue on which the courts below based their decisions is now pending before the Supreme Court of Texas, and where that court has never passed upon the precise issue, should the judgment of the Court of Appeals be vacated and the cause remanded to await the state court's declaration of the local law on the controlling issue.

## STATEMENT

This is an interpleader suit brought by the mineral lessee, Union Producing Company, a Delaware corporation, against those persons asserting mineral and royalty interests in a tract of land located in the Rio Grande Valley in Texas. The only controversy is between the petitioners and the respondents, all of whom are citizens of the State of Texas, the question being whether the interests of the

term mineral owners (petitioners) have terminated and reverted to respondents.

Petitioners claim under deeds (R. 26, 29) executed in 1935 conveying fractional interests in the minerals for a stated term of years and so long thereafter as oil, gas or other minerals are produced from the property. Such deeds further provide that it will not be necessary for the grantees to join in the execution of any lease, and as found by the District Court, (R. 222) all parties construed the deeds as reserving to the grantors, under whom respondents claim, the exclusive right to lease all of the minerals. In 1949, respondents executed an oil and gas lease (Supp. R. 1) purporting to lease all of the minerals, including petitioners' interests therein, which lease included what is commonly termed a shut-in gas well clause (Supp. R. 10). This clause provides that where gas is discovered but not marketed, the lessee may pay a stated sum, and upon such payment, it will be considered that gas is being produced from the premises. A well *was* drilled; gas *was* discovered; the gas *was not* marketed pending the laying of gathering lines prior to the date specified for the termination of petitioners' interests (R. 18) and shut-in gas royalties *were* paid to petitioners and tendered to respondents within the period provided for in the lease (R. 125, 129, 183). Gas and condensate have been produced and marketed continuously since early April, 1956 (R. 19).

Under these facts the District Court granted a summary judgment to respondents relying upon the *dictum* in a case decided by an intermediate appellate court of this state which is readily distinguishable,[1] and holding that the peti-

[1] *Sellers* v. *Breidenbach*, 300 S.W. 2d 178 (Tex. Civ. App. 1957). While the case did involve a shut-in gas well, the lease did not have a shut-in royalty clause, and there consequently was no provision in the lease defining production to include such payments (R. 135).

tioners' interests had terminated on the ground that the lease provision defining production to include the payment of shut-in royalties did not inure to petitioners' benefit. The Court of Appeals affirmed summarily without even discussing two closely analogous cases decided by the Supreme Court of Texas[2] which held that lease provisions defining production to include production from pooled units constitute a modification of the term interests, and that consequently, such lease definitions do inure to the benefit of the term interest owners.

## REASONS FOR GRANTING THE WRIT

1. The oil and gas industry is, of course, a most important segment of the economy of this state. Conveyances of fractional interests in minerals for stated terms and so long thereafter as minerals are produced are becoming increasingly prevalent, and are, in turn, a significant part of our oil and gas industry. Petitioners respectfully submit that the decision of the Court of Appeals is in conflict with the local law as declared by the highest court of the state in the *Spradley* and *Southland* decisions, supra, in closely analogous cases. While distinguishable from the instant case since the set of circumstances defined by the leases as production differ from those herein involved, the rationale of those decisions — that the lease definitions inure to the benefit of term interest owners — is clear. Purely as a matter of forecasting the decision of the Supreme Court of Texas on the precise issue here involved, petitioners submit that the Court of Appeals erred. However, no forecast by the federal courts on this important issue of local law is necessary since the *precise issue* on which both the Dis-

[2] *Spradley* v. *Finley*, 302 S.W. 2d 409 (Tex. Sup. 1957); *Southland Royalty Co.* v. *Humble Oil & Refining Co.*, 249 S.W. 2d 914 (Tex. Sup. 1952).

trict Court and the Court of Appeals based their decisions is now pending in the Supreme Court of Texas. In the case of *Archer County, et al,* v. *Webb, et al,* the State District Court of Crockett County, Texas, entered summary judgment in favor of term royalty owners whose interests were to expire in the absence of production, holding that such interests were extended by virtue of a lease provision defining production to include the payment of royalties on a shut-in gas well. The Court of Appeals for the Eighth Judicial District sitting at El Paso, Texas, reversed on the basis of the opinion of the Court of Appeals in the instant case, and a motion for rehearing was denied on July 15, 1959. The opinion of the Court of Civil Appeals is reported in ..... S.W. 2d ..... Due to basic factual similarities, the decision by the Supreme Court of Texas should doubtlessly be controlling of this case. As shown by the certificate of the Clerk of the Supreme Court of Texas (Appendix B, infra., page ....) a writ of error has been applied for, and action by that court on the application is expected momentarily.

Unless this petition for a writ of certiorari is granted, petitioners' interests will be irretrievably lost even though the Supreme Court of Texas, whose decisions control in cases of this kind, *Erie Railroad* v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1937), declares the rule in Texas, as it is in Louisiana,[3] to be that term interests are extended by the payment of shut-in royalties pursuant to the lease provision. It is evident that in that event, a serious injustice will have been done to petitioners, and their interests will have terminated solely because of the fortuitous

[3] *LeBlanc* v. *Haynesville Mercantile Co., Inc.,* 88 So. 2d 377, (La. Sup. 195....).

combination of the incorporation of Union Producing Company in Delaware, the Texas citizenship of the claimants to the mineral interests, and the election of Union Producing Company, which actually has no interest in the outcome of the litigation, to file this suit in the federal court rather than in the state court. Petitioners respectfully submit that no such contrariety should be encouraged by a premature decision of the federal courts when an opportunity to insure unanimity is presented by a case pending in the highest court of the state.

Since the Court's decision in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 85 L. Ed. 327, 61 S. Ct. 347 (1941), it is settled that in cases governed by local law, decisions of the highest court of the state announced subsequent to the judgment of the District Court but prior to the entry of a final judgment in the federal courts, must be followed. This Court has vacated judgments of courts of appeal and remanded cases to those courts for reconsideration in the light of subsequent state decisions. *Huddleston* v. *Dwyer*, 322 U.S. 232, 88 L. Ed 1246 ..... S. Ct. ..... (1943). Numerous other decisions have announced the desirability of staying actions in the federal courts pending decisions by the state courts where local law is decisive. *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 86 L. Ed. 1355, 62 S. Ct. 786 (1941); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1940); *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 265 (1942); *Manufacturers Casualty Insurance Company* v. *Coker*, 219 F. 2d 631 (4th Cir. 1955); *Cowling* v. *Deep Vein Coal Co.*, 183 F. 2d 652 (7th Cir. 1950). This is particularly true where a suit is already pending in the state court. *Arkansas* v. *Texas*, 346 U.S. 368, 98 L. Ed. 80, 74 S. Ct. 109 (1953).

As was observed by the Court in the recent case of *Louisiana Power & Light Company* v. *Thibodeaux*, 3 L. Ed. 1058 (1959):

> "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state laws . . . "

The Court has also stated in *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 84 L. Ed. 876, 60 S. Ct. 628 (1939):

> " . . . Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois, it may appear that rights in local property of parties to this proceeding have — by the accident of federal jurisdiction — been determined contrary to the law of the state which in such matters is supreme."

The application of the Court's statement in the *Thompson* case to the instant case is abundantly clear. If the writ is denied petitioners will have lost their interests although in the *Archer County* case, the Supreme Court of Texas may, and petitioners submit that said court will by virtue of its earlier analogous decisions, declare erroneous the forecast of the local law by the Court of Appeals in this case. The delicate federal-state relationship is hardly prompted by such a result which can be easily averted by the simple expedient of postponing a final judgment in this case.

## CONCLUSION

Petitioners respectfully submit that the only commonsense approach to the problem dictates that (1) this case be reversed, (2) the judgment of the Court of Appeals be vacated, and (3) the Court of Appeals be instructed to defer

further consideration until the impending decision in the *Archer County* case by the Supreme Court of Texas has been made.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Copies of the above and foregoing petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon all counsel for respondents and Mr. W. S. Stovall, by placing copies of same properly addressed and stamped in the United States mail on this the 22 day of August, 1959.

Austin C. Wilson

AUSTIN C. WILSON

## APPENDIX A

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

---

No. 17495

---

J. VIRGIL SCOTT, ET AL and PAUL J. ROGERS, ET AL.,
*Appellants,*

v.

UNION PRODUCING COMPANY, ET AL.,
*Appellees.*

---

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS.

---

(May 21, 1959.)

---

Before HUTCHESON, Chief Judge, and TUTTLE and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: These are appeals from a summary judgment entered on motions filed in an interpleader action brought by Union Producing Co., lessee in an oil and gas lease, to have determined and declared the owners of mineral interests subject to the lease and the pro-

portions of royalties and payments thereunder to which, as such owners, they are entitled. It presents for decision here the single question whether the district judge erred in holding, on the authority of *Sellers* v. *Breidenbach*, 300 SW(2) 178,[1] that the fractional mineral interests acquired by appellants under term mineral deeds had terminated, and the interests had reverted to the grantors.

Because the undisputed and controlling facts are fully and correctly set out and the law is as fully and correctly declared in the thoughtful opinion[2] of the district judge, we shall not undertake to present and discuss the theories and arguments of appellants and appellees in opposition and in support, but, referring with agreement and approval to the district judge's analysis of the law and the facts and contenting ourselves with adopting his thorough going opinion as our own, we affirm the judgment upon the considerations and for the reasons stated by him.

We add only a reference to the recent opinion of the Supreme Court of Texas in *Midwest Oil* v. *Winsauer*, ..... Tex. ..... (4-15-59), a case dealing with a temporary cessation of production without fault on the part of the operator after production had been begun within the term.

There, distinguishing the Sellers and Holchak cases, the Supreme Court expressly approved the principle upon which they were decided, that term clauses in mineral deeds are analogous to and must be given the same effect as similar term clauses in term mineral leases. Saying:

---

[1] Cf. Freeman v. Magnolia, 141 Texas 274, Morrison v. Swaim, 220 S.W(2) 493; Clark v. Holchak, 152 Tex. 26; and *Holchak* v. *Clark, 284 SW(2) 399.*

[2] Union Producing Co. v. Scott, ..... F. Supp. ....., June, 1958.

> "We see no reason why the same general principles of law governing the construction of oil and gas leases containing habendum clauses providing the estate conveyed shall continue after the expiration of its primary term so long as oil or gas is produced, should not be applicable to the construction of a term royalty deed containing the same or similar provisions. The 'term royalty' in the case at bar is a determinable fee just as is the lessee's estate."

and citing applicable cases, the Supreme Court held that *in the event of temporary cessation of production without fault on the part of the operator,* plaintiffs' right to enjoy the royalty "will continue in any event as long as the operator in good faith exercises diligence."

Rejecting the claim that Holchak and Sellers had held differently, the court stated:

> "These cases are not in point. Neither of these cases dealt with the question of cessation of production either temporary or permanent. The question in the Holchak case, supra, was 'whether or not there was paying production from the land within six months after Dec. 10, 1945, i.e., on June 10, 1946'. The uncontradicted evidence was that on or before June 10, 1946, there was no production from the well situated on the premises covered by the royalty deed. The same question was involved in the Sellers case, supra. The court simply held there was no production whatever from the premises."

In the light of this opinion, of the cases cited in it, and of those cited by the district judge, we believe there is no escape from his conclusion that the reliance of the mineral deeds claimants upon the shut-in gas well provision in the oil and gas lease will not do, and that this is so for the reason stated by him:

> *"It is the mineral deed, not the lease,* that should have contained a provision securing to the term mineral owners the benefit of a shut-in gas well provision."

The judgment was right. It is AFFIRMED.

[SEAL]

A true copy

Test:

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
AUG 5 1959

## JUDGMENT

---

Extract from the Minutes of May 21, 1959.

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No. 17495

---

J. VIRGIL SCOTT, ET AL., and PAUL J. ROGERS, ET AL.,

v.

UNION PRODUCING COMPANY, ET AL.

---

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, J. Virgil Scott, and others and the surety on their Cost Bond herein, National Surety Corporation, and the appellants Paul J. Rogers, and others and the surety on their Cost Bond herein, Globe Indemnity Company of New York, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * *

**APPENDIX B**

IN THE

# Supreme Court of Texas

---

No. A-7490

---

ARCHER COUNTY, TEXAS, ET AL.,

v.

C. R. WEBB, ET AL.

---

FROM CROCKETT COUNTY, EIGHTH DISTRICT.

---

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that application on behalf of Archer County, Texas, et al, and application on behalf of C. R. Webb, et al, for writs of error to the Court of Civil Appeals, Eighth Supreme Judicial District, were received and filed as numbered and styled above, on this 17th day of August, 1959.

IN TESTIMONY WHEREOF witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 17th day of August, 1959.

GEO. H. TEMPLIN, Clerk

By /s/ JEWELL SEELIGER
Mrs. Jewell Seeliger, Deputy

[SEAL]

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No. 340

J. VIRGIL SCOTT, ET AL AND PAUL J. ROGERS, ET AL,
*Petitioners,*

v.

UNION PRODUCING COMPANY, ET AL,
*Respondents.*

## STATEMENT OF RESPONDENT UNION PRODUCING COMPANY

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September, 1959

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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In The

# Supreme Court of the United States

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No. 340

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J. Virgil Scott, et al and Paul J. Rogers, et al,
*Petitioners,*

v.

Union Producing Company, et al,
*Respondents.*

---

## STATEMENT OF RESPONDENT UNION PRODUCING COMPANY

---

Union Producing Company brought this action of interpleader under Title 28 U.S.C., Sections 1337, 1397, and 2361, and Title 28 U.S.C., Section 1332 to determine ownership of royalties from production under oil, gas and mineral leasehold estates owned by this Respondent in Hidalgo County, Texas. This Respondent as the interpleader takes no position on the merits of the petition for writ of certiorari, having sought only to have the Court declare the

ownership of such royalties and direct the proper manner of payment.

Respectfully submitted,

.....

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September, 1959

## CERTIFICATE OF SERVICE

Copies of the above and foregoing Statement of Respondent, Union Producing Company, were served upon the following counsel for Petitioners and other Respondents by placing copies, properly addressed and stamped, in the United States mails on the 29 day of September, 1959: Mr. John C. White, 838-842 Transportation Building, Washington 6, D. C.; Mr. John H. Dittmar, Milam Building, San Antonio, Texas; Messrs. Austin C. Wilson and M. W. Parse, Jr., Bank of the Southwest Building, Houston 2, Texas, Attorneys for Petitioners; and Mr. Orville I. Cox, Box 3066, McAllen, Texas; Mr. George G. Clifton, 811 Frost National Bank Building, San Antonio 5, Texas; Mr. Malcolm McDermott, Box 3667, McAllen, Texas, Attorneys for other Respondents; and Mr. W. S. Stovall, 318 Furr Drive, San Antonio, Texas.

.....

THOMAS FLETCHER

FILED
OCT 3 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

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J. VIRGIL SCOTT, ET AL AND PAUL J. ROGERS, ET AL,
*Appellants,*

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## REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Claire H. Parmelee and husband, Clyde D. Parmelee, J. J. Burdin, Horace Etchison, G. Sueyasu and wife, Asao Sueyasu, in reply to the Petition for Writ of Certiorari filed herein, respectfully insist that this cause has been, in all things, correctly determined by the Courts below, and herewith submit this Reply.

## QUESTIONS PRESENTED

1. Whether the Court of Appeals committed reversible error in its application of the local law of Texas, holding that the terminal provision of a term mineral deed was not modified by shut-in gas well rental pro-

vision of a subsequent oil and gas lease executed by the reversioners to a third-party lessee.

2. When application for writ of error has been made to the Supreme Court of Texas requesting review of a case involving a similar question, and if the Supreme Court of Texas should grant such application, and if in reviewing such case should decide to overrule prior final decisions declaring the applicable law, should the judgment of the Court of Appeals in this case be vacated and this cause remanded to await the outcome of such contingencies?

## STATEMENT

Petitioners claim title to fractional interests under two term mineral deeds executed in 1935. These deeds contain identical terminal provisions, as follows:

> "It is further agreed and herein stipulated that in case there is no *paying production* on said land on or before April 25, 1955, and for six months thereafter, this grant shall become null and void and the minerals hereby conveyed shall revert to the said Grantor, her heirs and assigns, but should there be such production, then, and in that event this grant shall remain in full force and effect until such production ceases, after which this instrument shall become null and void."
> (Emphasis added). (R. pp. 26, 29).

These limited term grants contained no substitute production clauses which would allow said grants to be kept alive beyond the reversion date by shut-in well payments in lieu of paying production. Only paying production on and after said date would prolong the grants. (R. 26-31, Exhibits 1 and 2).

In 1954 Respondents executed an oil and gas lease on the property in question in favor of Union Producing Company, plaintiff herein (Supp. R. 1.). Petitioners are in error in referring to this lease as having been executed in 1949. The lease contains a shut-in gas well clause providing, in effect, that while gas from a gas well is not being marketed, lessee may, at its option, pay lessor stated sums of money quarterly, and upon such payment "it will be considered that gas is being produced from said land". (Supp. R. 10). Gas was discovered prior to October 25, 1955, the terminal date of the mineral deeds of 1935, but no gas was produced from such properties in paying quantities until April, 1956. In January, 1956, lessee paid Petitioners, and tendered Respondents, the quarterly shut-in gas well rental provided for in the lease, which tender was refused by Respondents. (R. 144, 149). Petitioners' claim of title under the 1935 term mineral deeds resulted in this suit.

The District Court granted Respondents' motion for summary judgment, holding that there was no paying production on the land on the terminal date of the deeds (R. p. 220) and that the oil and gas lease of 1954, in favor of Union Producing Company, lessee, did not modify the term limitation of the mineral deeds of 1935 (R. p. 226). This ruling was determinative of the case, and other affirmative defenses asserted to Petitioners' claim of title were not ruled upon.

The Court of Appeals, referring "with agreement and approval of the District Judge's analysis of the law and the facts" and adopting "his thorough going opinion", affirmed the judgment.

## DISCUSSION

In substance, Petitioners assert:

(1) The decision of the Court of Appeals is in conflict with the holding of the Supreme Court of Texas in the cases of *Spradley v. Finley*, 302 SW 2d, 409, and *Southland Royalty Company v. Humble Oil & Refining Company*, 249 SW 2d, 914.

(2) That application is now pending in the Supreme Court of Texas for writ of error, requesting review of the case of *Archer County, et al. v. Webb, et al.*, 326 SW 2d, 250 (Southwestern advance sheet of September 1st., 1959), and that if such application is granted, the Supreme Court of Texas may change the law of Texas as declared by the Court of Civil Appeals at El Paso, Texas in the Archer County case, and as announced by the Court of Civil Appeals at San Antonio, Texas in the cases of *Sellers v. Breidenbach*, 300 SW 2d, 178 (1957), and *Holchak v. Clark*, 284 SW 2d, 399 (1955).

## ALLEGED CONFLICT WITH POOLING CASES

Petitioners assert that the decision of the Court of Appeals is in conflict with the decision of the Supreme Court of Texas in the Spradley and Southland cases. These two pooling cases deal with actual physical paying production. The rationale of these decisions is based upon mutual agreement between the parties to the mineral deed, term mineral owners and reversioners, expressed in the pooling clauses of subsequent oil and gas leases. Petitioners admit that the circumstances in the pooling cases differ from those here involved, but they confuse the effect of actual paying

production from the pooled unit in the pooling cases, with the effect of the optional rental payment of the shut-in gas well clause in this case. Petitioners contend that by Respondents' execution of this lease to a third party with such a clause whereunder Lessee might prolong its lease beyond the expiration of the primary term in 1959, these reversioners thereby, without more, and without any consideration being paid them for so doing, incorporated such shut-in well clause into the limited term grants executed by their predecessor in title, Emma B. Hammond, back in 1935, so as to permit Petitioners' term grants to be extended beyond the reversion date of October 25, 1955, for such time as shut-in well payments were made pursuant to said clause. (Petition 3). This substitute production clause of said lease shows on its face that it was designed solely for the purpose of allowing the lease to be kept alive by and for the Lessee after the end of the paid-up primary term in 1959. Prior to that date, substitute production could not be material or operative. There is not a word or a phrase indicating any intent to write this clause into the prior limited term grants of 1935, and to make it operative on October 25, 1955. In the pooling cases, all owners of mineral interests in certain lands executed leases whereby they agreed to pooling, which meant, under the law of Texas, that they agreed that production from any part of the pool should constitute production from each parcel of land committed to the pool. Each owner thus got the right to share proportionately in the production from the entire pool, in return for giving up the right to share exclusively in production from his own parcel. In both of these cases, there was actual paying production on the reversion date, and the ques-

tion was whether such production on one part of the pool operated to keep alive a term mineral grant on other land in the pool, which would otherwise have lapsed for want of production thereon. The court held that by agreeing to pooling and the legal incidents thereof, all the parties had agreed for good consideration as between themselves that production anywhere on the pooled lands would constitute production from each parcel, and thus would fulfill the condition that would keep alive term mineral grants that would have otherwise expired for want of production from such lands.

The able trial Judge clearly distinguishes this case from the Spradley and Southland cases, in these words:

> "But the Southland and Spradley cases are bottomed upon the mutual AGREEMENT of the reversioners and the owners of the term mineral interests. In those cases and the ones upon which they are based (footnote 6, supra) all the parties to the joint or contemporaneous leases SURRENDERED something and RECEIVED something. They surrendered their right to claim ALL royalties from their particular land; and they received a right to share proportionately in the lands of the other parties to the leases. There was consideration. There was AGREEMENT.
>
> "Here the Parmelee-Etchison group did agree WITH UNION that shut-in gas well rentals would keep the LEASE alive. They did NOT AGREE with the owners of the term mineral interests, or with anyone else, that the shut-in gas well payments would prolong or extend the term MINERAL GRANTS. The ex parte ratifications by the owners of the term mineral interests, more than a year later, could not and did not create an

> agreement by the Parmelee-Etchison group to extend the term mineral grants, or that 'shut-in' payments would constitute 'paying production' WITHIN THE MEANING OF THE MINERAL GRANTS. The Parmelee-Etchison group has done nothing at any time to indicate a relinquishment of their right to claim a reversion in the event of 'no paying production on said land' upon the termination date. As the Court said in Sellers v. Breidenbach, supra: 'The parties could have placed in their royalty deed a shut-in gas well provision, if they had desired to do so, but we find no such provision in this deed.' " (R. pp. 225-226).

The Court of Appeals approved and adopted the opinion of the District Court, affirming the judgment for the reasons stated by the trial Court.

The Appellate Courts of Texas have found no conflict between the pooling cases and the rule announced in the instant case. In the *Archer County* case, 326 SW 2d, 250, a similar question was before the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas. In that case the Court clearly distinguishes the Spradley and Southland cases and follows the rule announced in *Sellers v. Breidenbach*, 300 SW 2d, 178 (1957), Writ Refused. The El Paso Court of Civil Appeals cited with approval the holdings of the District Court and the Court of Appeals in this case. The Supreme Court of Texas, in both the Spradley and Southland cases, explicitly bases its decisions upon contracts and agreements, modifying the term limitation clause in the mineral deeds, subsequently entered into and executed by the parties to the mineral deeds.

In the case of *Sellers v. Breidenbach*, 300 SW 2d, 178 (1957), Writ Refused, the Court of Civil Appeals

for the Fourth Supreme Judicial District of Texas, construed the terms of a clause in a term royalty deed, which is identical with the terms of the clause before this Court for construction. In the Sellers case, on the terminal date of the deed "there were two completed shut-in gas wells capable of producing gas, but absolutely not producing". The Court stated:

> "The parties could have placed in their royalty deed a shut-in gas well provision, if they had desired to do so, but we find no such provision in this deed. They could have provided that the royalty deed would be continued in effect if a well capable of producing was completed on the premises, if they had so desired, but they did not do so. 'Paying Production' does not mean the completion of a well capable of producing, it means a well which is actually producing on the significant date."

The action of the Supreme Court of Texas on application for writ of error filed in the Sellers case was "Refused" rather than "Refused. No Reversible Error". By such action of the Supreme Court of Texas, the opinion of the Court of Civil Appeals is given the same precedential value as one of the Supreme Court's own opinions and, by unanimous agreement, the Justices of the Supreme Court have declared that such opinion "in all respects has correctly declared the law". Hon. Robert W. Calvert, Associate Justice, Supreme Court of Texas in his commentary "*The Application for Writ of Error*", a discussion of Rule 469, Texas Rules of Civil Procedure; *Vernon's Annotated Texas Rules of Civil Procedure, Vol.* 3, *page* 404; also *Rule* 483, *Vernon's Annotated Texas Rules of Civil Procedure, Vol.* 3, *page* 440. (Appendix A & Appendix B)

Opposing counsel have undertaken (Petition 3, line 28, and note 1) to brush aside this clear-cut holding by referring to it as a "dictum in a case decided by an intermediate appellate court of this state which is readily distinguishable," —. Counsel failed to show in their petition that this case was taken before the Supreme Court of Texas on petition for writ of error, which court placed its stamp of approval thereon by refusing to grant the writ. The alleged ground for distinguishing the case is set out in an affidavit filed by one of the opposing counsel (R. 135-136) who claims to have examined the briefs filed in the *Sellers* case and to have found that the lease there involved did not contain a shut-in well clause. No more complete answer can be given to this effort to distinguish the *Sellers* case than that by the able District Judge, who said (R. 221):

> "Counsel seek to distinguish the Sellers-Breidenbach case by an affidavit that they have searched the records and that the LEASE there did not contain, as here, a shut-in gas well provision. But, as disclosed by the emphasized portions of the foregoing quotation from the opinion, it is the MINERAL DEED, NOT THE LEASE, that should have contained a provision securing to the term mineral owners the benefit of a shut-in gas well provision."
> (Emphasis by the Court).

In *Holchak v. Clark*, 284 SW 2d, 399 (1955), Writ Refused, the Court construed a term limitation clause in a mineral deed of practically the exact wording as the clause in the instant case. The rule of construction applied in this Holchak case is the same rule applied in

the Archer County case and the Sellers case, and followed by the Court of Appeals in the instant case.

The Court states the rule to be:

> "Had the parties desired a provision which would allow the term of the deed to be extended by a discovery of oil within the definite term, followed by diligent operations thereafter, they could have expressly so provided. As said by the United States District Court for the Eastern District of Oklahoma in Wickham v. Skelly Oil Co., 106 F. Supp. 61, 69, affirmed Skelly Oil Co. vs. Wickham, 10 Cir., 202 F. 2d 442: 'No court will rewrite or reform a contract for the parties in the absence of fraud or mutual mistake, therefore, this court will not rewrite the lease contract for the parties and in effect substitute a reformed contract for them to include something which is not present in the lease as made. To do so would be to construe a simple "well completion clause" to have the meaning of a "continuous drilling clause" or a "continuous development or operation clause".' Continuous operation clauses are usual in oil, gas and mineral leases and royalty conveyances. Rogers v. Osborn, 152 Tex. 540, 261 SW 2d, 311. It is not necessary that courts supply them."

This opinion was written by Judge Norvel, now Associate Justice of the Supreme Court of Texas. On application for writ of error, the Supreme Court of Texas gave this opinion the same stamp of approval which it later gave the Sellers case.

## POSSIBLE CONFLICT IN FUTURO

Petitioners are in essence speculating upon the chance that the Supreme Court of Texas, in disposing

of the petition for writ of error in the Archer County case, may make some declaration of law that will in some manner support their view of Texas law in this case. Petitioners advance their forecast of the action to be taken by the Supreme Court of Texas on the application for writ of error filed in the Archer County case as a reason for granting certiorari herein and remanding. Respondents insist that the approval of the Supreme Court of Texas of the principles of law announced in the Sellers and Holchak cases clearly indicates the action which will be taken on the application for writ of error filed in the Archer County case. It cannot be reasonably anticipated that the Supreme Court of Texas will change the rule approved by it in these cases. It is not the function of a writ of certiorari to delay disposition of a pending suit merely because the unsuccessful litigant hopes that State law may be changed in his favor by a later State decision. The application for writ of error in the Archer County case was filed in the Supreme Court of Texas on August 17, 1959 and it cannot be reasonably anticipated that action thereon may be "expected momentarily". In the Court of Appeals Petitioners sought a rehearing upon this same ground, while the Archer County Case was pending before the Texas Court of Civil Appeals, vigorously asserting that a decision favorable to their contentions would be forthcoming if only judgment herein were delayed. An amicus curiae brief was filed by one of the counsel in the Archer County Case in support of Petitioners' position. Said petition for rehearing in the Court of Appeals was disallowed.

EVEN THOUGH SUCH SHUT-IN GAS WELL CLAUSE BE CONSIDERED A MODIFICATION OF THE TERM MINERAL DEEDS OF 1935, THE OPTION THEREIN GRANTED UNION PRODUCING COMPANY, LESSEE, WAS NOT EXERCISED UNTIL APPROXIMATELY THREE MONTHS AFTER THE REVERSION OF THE MINERALS GRANTED THEREBY.

Having held that the shut-in gas well clause of the lease did not enlarge the term limitation of the prior deeds, both the District Court and the Court of Appeals found it unnecessary to rule on the timeliness of the shut-in gas well tender. The well was completed and shut-in prior to October 25, 1955, the significant date in the deeds. On October 25, 1955 there was no paying production from the lands, and the grants terminated. In January, 1956, lessee tendered the shut-in gas well payments.

In the leading case of *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 171 SW 2d, 339 (1943), the Supreme Court of Texas laid down the rule that where the period allowed for making a shut-in well payment to keep alive a mineral estate "straddles" the date for expiration of the term, such payment must be made before such expiration date and while the term is yet alive, otherwise it comes too late and the estate lapses on the date fixed. This holding was stated and reaffirmed by the Supreme Court of Texas in a later leading case, *Rogers v. Osborn*, 152 Tex. 540, 261 SW 2d, 311 (1953). Texas law holds that if substitute production is to keep a limited term estate alive, then it must be operative on the reversion date. It cannot be

brought into effect after the estate has already lapsed. In other words, substitute production does not operate retroactively, so as to revive an estate already lapsed.

It thus appears that this case falls squarely within the factual situation dealt with in *Freeman v. Magnolia Petroleum Co.*, supra. The well was shut-in on October 23, 1955; Petitioners' limited term estates were set to lapse on October 25, 1955; the shut-in well payment relied upon as substitute production to keep Petitioners' limited term estates alive beyond October 25, 1955, was not tendered until after January 17, 1956. It follows that even if the shut-in well clause of the lease of 1954 to Union Producing Company should be deemed a part of Petitioners' limited term grants, and even if it can be said that the shut-in well payment was properly tendered within the quarterly period allowed therefor, nevertheless it came too late to serve as substitute production to keep Petitioners' estates alive, for the term grants had already reverted on October 25, 1955. This is the established law of Texas as laid down by its Supreme Court in the *Freeman* case and reaffirmed in the *Rogers* case. For substitute production to be effective under this clause to keep Petitioners' limited term grants alive, the shut-in well payment must have been made before October 25, 1955.

The learned District Judge did not pass on this point in his decision of the instant case, for the obvious reason that it was not necessary to do so. His holding that the shut-in well clause of the lease was not to be read into Petitioners' limited term grants, was decisive of the case, and rendered it altogether unnecessary to go

further and deal with this additional point. Nonetheless, it is equally decisive of the case. Obviously, the granting of the petition for certiorari filed herein would be pointless, since the *Freeman* and *Rogers* cases, supra, are controlling on this decisive principle of Texas law.

This is an ordinary suit between citizens of the State of Texas brought to determine title to mineral interests in lands situated in Texas. Federal jurisdiction is conferred only by reason of diversity on the part of the disinterested party plaintiff interpleader. No Federal law, statute, or decision is remotely involved. Unlike the abstention cases cited by Petitioners, no constitutional question is presented, no issue of comity, disruption of State administrative process, collection of State taxes, exercise of eminent domain by a State agency, or any other principle of law of public importance is involved. Petitioners suggest no question whose resolution by this Court will have any importance beyond the parties here involved. A local rule of construction of a clause in an oil and gas lease is presented. The local rules of construction of oil and gas leases, royalty and mineral deeds, and other instruments creating rights and titles in mineral estates, are peculiar to the State of Texas. There is little unanimity among the oil-producing States in the rules of construction of such instruments. In both the District Court and the Court of Appeals, able Judges, well versed in the principles of law here involved, have determined the issue. The applicable law of Texas, as announced by Texas Courts, has been cited and followed.

## CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Copies of the above and foregoing Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon all counsel for Petitioners and Mr. W. S. Stovall, by placing copies of same properly addressed and stamped in the United States mail on this, the ..... day of September, A.D. 1959.

JAMES C. ABBOTT

## APPENDIX "A"

EXCERPT FROM THE "APPLICATION FOR WRIT OF ERROR" BY HONORABLE ROBERT W. CALVERT, ASSOCIATE JUSTICE, SUPREME COURT OF TEXAS.

"If no more than two of the Justices believe the judgment of the Court of Civil Appeals is erroneous, the writ will be denied and the conference then determines whether the application will be stamped 'Refused' or 'Refused. No Reversible Error'.

"The notation 'Refused. No Reversible Error' is applied automatically if the opinion of the Court of Civil Appeals has dealt with questions which are not within the jurisdiction of the Supreme Court or which are not brought forward by Points of Error for review by the Supreme Court (Shambry v. Housing Authority, 1953, 152 T. 122, 255 S. W. 2d 184); or if the Justices are not unanimous in the view that the judgment of the Court of Civil Appeals is a correct one; or if the opinion of the Court of Civil Appeals has dealt with questions of law not necessary to a decision of the case. If none of these situations exists, the opinion of the Court of Civil Appeals is carefully considered and frequently read aloud to see if the Justices can reach a unanimous agreement that it 'in all respects has correctly declared the law' before it is given the same precedential value as one of the Supreme Court's own opinions by stamping it 'Refused'. If unanimity cannot be achieved it is stamped 'Refused. No Reversible Error'. See 12 Texas Bar Journal 547, Notations on Applications for Writs of Error, by Gordon

Simpson, former Associate Justice of the Supreme Court."

*Vernon's Annotated Texas Rules of Civil Procedure, Vol.* 3 *at page* 411.

## APPENDIX "B"

## TEXAS RULES OF CIVIL PROCEDURE:

"RULE 483. Order on Application for Writ of Error

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'

"In cases of conflict named in subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended, the Supreme Court shall grant the application for writ of error, unless it be in agreement with the decision of the Court of Civil Appeals in the case wherein the application is filed, in which event said Supreme Court shall so state in its order, with such explanatory remarks as may be deemed appropriate. In cases where the decision of the Court of Civil Appeals is in conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse the same on the application for writ

[redacted]

NO. 240

J. VIRGIL SCOTT, ET AL., and PAUL A. SCOTT, ET AL., *Appellants*,

v.

UNION PRODUCING COMPANY, ET AL., *Appellees*.

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SUPPLEMENTAL REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

# Supreme Court of the United States

October Term 1959

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NO. 340

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J. VIRGIL SCOTT, ET AL., and PAUL J. ROGERS, ET AL., *Appellants*

v.

UNION PRODUCING COMPANY, ET AL., *Appellees*

---

## SUPPLEMENTAL REPLY TO APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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### Statement

Appellee-Respondents, Claire H. Parmelee and husband, Clyde D. Parmelee, J. J. Burdin, Horace Etchison, G. G. Sueyasu and wife Asao Sueyasu, respectfully ask leave of the Honorable Court to submit this their Supplemental Reply to the Petition of J. Virgil Scott, et al. for a writ of certiorari in the above styled and numbered cause.

Since the filing of their original Reply to said Petition the Supreme Court of Texas has handed down its opinion in the case of *Gulf Oil Corporation v. E. L. Reid*,

a certified copy of which opinion is hereto annexed as Appendix A, and is, we submit, determinative of the case at bar.

## Argument

As shown on its face, said opinion in the *Reid* case, rendered on March 23, 1960, squarely reaffirms, supports and applies the ruling of the Supreme Court of Texas in the case of *Freeman v. Magnolia Petroleum Oil Company*, 141 Tex. 274, 171 S.W. 2d 339 (Tex. Sup. 1943), cited and relied upon by these Respondents at pages 12 and 13 of their original Reply. As explicitly stated by the Supreme Court of Texas in the later case of *Rogers v. Osborn*, 152 Tex. 540, 261 S.W. 2d 311 (Tex. Sup. 1953), the ratio decidendi of the *Freeman* case is as follows:

> "And we have held that where the 'year' of this shut-in gas royalty clause straddles the date for expiration of the primary term, the shut-in payment must be made during the primary term, or the lease expires. Freeman v. Magnolia Petroleum Co., supra."
>
> *Rogers v. Osborn*, supra, P. 313.

In the *Reid* case a well capable of production was brought in on January 18, 1949, and was capped on that date for want of market facilities. On February 19, 1949, which was after the end of the primary term of the lease, the lessee tendered the "shut-in" gas royalty payment. Thereafter, on November 22, 1949, gathering lines were laid and connected, and from then on until the date of trial the well continued to produce in paying quantities. The lessee contended that since the "shut in" well payment was tendered within the time allowed for such payments, the lease was continued in force and effect.

In answering this contention of the lessee in the *Reid* case the Supreme Court of Texas said:

> "Just as the provisions in this lease have been held to deny a reasonable time to find a market after discovery of oil, so they have been construed to deny a reasonable time within which to pay 'shut-in' royalty after the 'shut-in' has taken place. This was explicitly held in *Freeman v. Magnolia*, supra, under similar facts, practically the only distinction being that in Freeman the discovery well had been brought in a few months prior to the end of the primary term. Gas was discovered in large quantities but none was used or sold off the premises. The 'shut-in' royalty was not tendered for more than four months after the end of the primary term. The lease lapsed as a matter of law, there being no gas produced from the premises on the last day of the primary term, and the royalty not having been paid on or before that date. The lease could not be revived by an attempt to pay the royalty four months thereafter."
>
> Appendix A, p. 13.

Thus the lease in the *Reid* case, as in the *Freeman* case, was held to have lapsed since the substitute production payment relied upon was not tendered before the end of the primary term even though tendered within the period allowed by the lease for "shut-in" well payments generally.

This we submit is the law of Texas, as laid down by the Supreme Court of that state.

In the case at bar the "shut-in" well payments, even if such substitute production were permitted under the provisions of the term grants here involved (which is expressly denied), came too late, for they were tendered some three months after the lapse of the term grants on October 25, 1955. (R. 149-150, 183-184.)

It is submitted, therefore, that regardless of what view this Court may take on the question whether a substitute production provision was written into Petitioners' term grants, the tender of substitute production herein shown came too late, since admittedly it was not made until some three months after the termination of Petitioners' term grants on October 25, 1955.

Neither of the lower Federal courts found it necessary to pass upon this question, since both courts held that no provision for substitute production had been written into Petitioners' limited term grants, and therefore the term grants had lapsed on October 25, 1955.

The rationale of these holdings of the Supreme Court of Texas is that where substitute production is allowed in a lease or term grant, such substitute production sought to be brought into effect after the lapse of the primary term cannot keep alive that which is already dead.

This eminently sound rule of law squarely applies to the case at bar wherein the well capable of production was completed on October 17, 1955, and capped on October 23, 1955. On October 25, 1955, the term grants expired for want of production at that time. The attempted "shut-in" well payment was not tendered until after January 17, 1956. (R. 146, 183; 144, 145.) Even if such tender was made within the quarterly period after completion allowed by the lease for the making of "shut-in" well payments, nevertheless under the plain rule of the *Freeman* case it could not revive the term grants which had already lapsed.

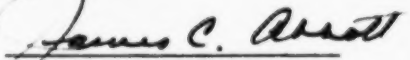
As heretofore stated, neither of the lower courts found it necessary to apply this rule of the *Freeman* case, inasmuch as they both held that there was no provision for substitute production in appellants' term grants. Even

if this Court should disagree with the two lower courts on this point, it would be a needless exercise of the power to grant writ of certiorari herein, or to remand the case, when the Supreme Court of Texas has so explicitly laid down the law of that state applicable to substitute production sought to be invoked after the termination date of the limited estate.

## Conclusion

For all of the foregoing reasons Respondents say that the Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,



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## Certificate of Service

Copies of the above and foregoing Supplemental Reply to Petition for Writ of Certiorari have been served on all counsel for Petitioners herein, and Mr. W. S. Stovall, pro se, prior to the filing hereof.

Dated: April 28, 1960.

James C. Abbott

JAMES C. ABBOTT

## APPENDIX A

NO. A-7343

## IN THE SUPREME COURT OF TEXAS

| | | |
|---|---|---|
| GULF OIL CORPORATION, Petitioner | § | From Orange County, |
| v. | § | Ninth District |
| E. L. REID, Respondent | § | |

The chief question presented here is whether the so-called "shut-in" royalty payment, tendered after a well capable of producing gas only in paying quantities had been capped, was so timely made as to extend the term of an oil and gas lease after the expiration of the primary term.

On December 9, 1943 E. L. Reid, who owned an undivided 1/8th mineral interest, executed to Gulf Oil Corporation an oil and gas lease for a primary term of five years. Gulf began the drilling of a well a few days before expiration of the primary term and continued drilling operations up to and including January 18, 1949, subsequent to the end of the primary term when the well in question was completed. This well, which was capable of production in paying quantities, was capped on that date due to the lack of market facilities. On February 19, 1949, Gulf tendered the "shut-in" gas royalty payment to Reid, which was rejected by him. On June 7, 1949, Gulf con-

tracted with a pipe line company for the sale and purchase of the gas. On November 22, 1949, the gathering lines had been laid and connected, and thereafter until the date of the trial of this case the well has continued to produce in paying quantities.

This suit was filed by E. L. Reid seeking to have the Court decree that the lease terminated under its own provisions and for recovery of title to and possession of his undivided 1/8th interest in the minerals, and for an accounting. The trial court denied the relief sought, and held the mineral lease to be in full force and effect. The Court of Civil Appeals reversed and remanded. 323 S.W. (2) 107. The applications for writ of error of both parties are before us. We will direct our attention first to that of Gulf Oil Corporation.

Petitioner asserts: (1) That it had a reasonable time to obtain a market for its gas from and after the completion of the well, (2) that inasmuch as no time was expressly provided within which the royalty must be paid, the only stated condition being that $50.00 be paid per well per year, by implication the lessee could pay the royalty at any time within the year following the "shut-in" of the well; (3) that there was actual production of gas within the terms of the lease; (4) that there was thereafter a cessation of production within the meaning of paragraph 5 of the lease so as to bring into play the 60-day cessation-of-production provision and thus keep the lease alive for a period of 60 days after the well was capped and production ceased; (5) that the lessee had the privilege of paying the "shut-in" royalty at any time so long as the lease was kept alive under any of its provisions. We think the Court

of Civil Appeals correctly resolved these issues against petitioner's contentions. The lease followed substantially the usual "unless" form.[1]

---

1 "2. Subject to the other provisions herein contained, this lease shall be for a term of Five (5) years from this date (called primary term) and as long thereafter as oil, gas or other mineral is produced from said land hereunder, or as long as drilling or reworking operations are being conducted on said land as is hereinafter provided.

"3. * * * where gas from a well producing gas only is not sold or used, Lessee may pay as royalty Fifty Dollars ($50.00) per well per year, and upon such payment it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; * * *.

"5. If, during the primary term and prior to the discovery of any mineral on said land, Lessee should drill a dry hole thereon, this lease shall not terminate if Lessee either commences additional operations for drilling on or before the rental date next ensuing after the expiration of sixty (60) days after the abandonment of said dry hole,/ or commences or resumes the payment or tender of rentals, as hereinabove provided, on or before the rental date next ensuing after the expiration of sixty (60) days after the abandonment of said dry hole. If a dry hole is completed and abandoned during the last period of the primary term, Lessee's rights shall remain in full force and effect without further operations until the expiration of said period. After the discovery of any mineral in paying quantities on the land, all of Lessee's rights shall remain in effect as long as any mineral is produced therefrom; and if, during the primary term, the production of all minerals therefrom should cease from any cause, this lease shall not terminate if Lessee either commences or resumes the payment or tender of rentals, as hereinabove provided, on or before the rental date next ensuing after the expiration of sixty (60) days after the cessation of production, or commences additional drilling or reworking operations on or before said next ensuing rental date. If cessation of production occurs at any time after the expiration of the primary term, then this lease shall not terminate if Lessee, until production is again procured, does not allow more than sixty (60) days to elapse between the cessation of production and

At the outset we will reiterate the following propositions that have been well established during the development of oil and gas law in this State. (1) An oil and gas lease such as the one we have before us created a determinable fee in the land which terminates upon the happening of the events upon which it is limited. Texas Co. v. Davis, 113 Tex. 321, 254 S.W. 304; W. T. Waggoner Estate v. Sigler Oil Co., 19 S.W. 2d 27; Stanolind Oil & Gas Co. v. Barnhill, Tex. Civ. App. err. ref.) 107 S.W. 2d 746; Cox v. Miller, (Tex. Civ. App. err. ref.) 184 S.W. 2d 323; (2) the word "production" as used in the habendum clause of this lease is equivalent to the phrase "production in paying quantities." The term "paying quantities" embraces not only the amount of production, but also the ability to market the product at a profit. Garcia et al v. King et al, 139 Tex. 578, 164 S.W. 2d 509. As said in that case, "the object of the contract was to secure the development of the property for the mutual benefit of the parties. It was contemplated that this would be done during the primary term of the contract." To this sentence we might add the phrase, "or during the extension of the lease term." Thus,

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the commencement of additional drilling or reworking operations in a bona fide effort to again obtain production, and successive attempts may be made so long as not more than sixty (60) days are allowed to elapse between the completion or abandonment of one well and the commencement of operations on another until production is again obtained. If, at the expiration of the primary term, oil, gas or other mineral is not being produced from the land then covered hereby, but Lessee is then engaged in operations for drilling or reworking operations on some part of the land hereunder, this lease shall not terminate if Lessee does not allow more than sixty (60) days to elapse between the abandonment of one well and the commencement of drilling or reworking operations on another until production is obtained."

no matter how great the potential production may be or how many million cubic feet of gas may have been flared, there would be no production or production in paying quantities unless there was an available market; (3) the fact that there is no available market is not an excuse for failure to produce, and the lease terminates unless some other provision will keep it in force. Rogers v. Osborn, 152 Tex. 540, 261 S.W. 2d 311; Stanolind Oil & Gas Co. v. Barnhill, supra; Watson v. Rochmill, 137 Tex. 565, 155 S.W. 2d 783; Freeman v. Magnolia Petroleum Co., 141 Tex. 274, 171 S.W. 2d 339; W. T. Waggoner Estate v. Sigler Oil Co., supra; Cox v. Miller, supra; Holchak v. Clark, 284 S.W. 2d 399 (Tex. Civ. App. err. ref.); Sellers v. Breidenbach, 300 S.W. 2d 178, (Tex. Civ. App. err. ref.).

The recital of these principles without further elaboration might well be sufficient to demonstrate the fallacy of Gulf's contention in this case.

The trial court, inter alia, made the following findings of fact: (1) No gas was sold from the well until November 22, 1949, when actual deliveries were made to the pipe line company; (2) Gulf was at all times diligent in attempting to secure a purchaser for the gas from this well and in expediting the completion of the pipe line company's facilities and connections; (3) that the marketing of the production from the lease was accomplished within a reasonable time after the completion of the well; (4) that the "shut-in" royalty payment was made within a reasonable time; (5) that the plaintiff had not ratified the lease after the completion of the well and is not estopped from urging that the lease has terminated.

In support of its contention that the lease is kept alive for a reasonable length of time to permit lessee to find a market, Gulf relies on Union Oil Company of California v. Ogden, (Tex. Civ. App.) 278 S.W. 2d 246 (wr. ref. n.r.e.). The Court does say in that case that the lessee should have a reasonable time to market the gas even though that time would extend beyond the primary term. It defines, however, "a reasonable time" as that time necessary for the lessee to lay gathering lines to the available market, saying that it was necessary for the lessee "to forthwith begin operations for laying the line and continue such operations with reasonable diligence and dispatch until the gas reached the market." In the absence of those operations the lease was held to be terminated. That decision only supports the holding of the Court of Civil Appeals in our case to the effect that laying extensions and connections from the well to the pipe line by the lessee are to be classified as drilling operations. That question we do not reach. The efforts of Gulf consisted solely of negotiations with the pipe line company and no manual operations were conducted by either Gulf or the pipe line company until some time after the June 7th contract.

The authorities hold to the contrary of Gulf's position here. In Holchak v. Clark, supra, the trial court thought as a matter of law that the discovery of oil kept the term "royalty deed" alive for a reasonable time after its termination date for the purpose of determining whether or not the well would produce in paying quantities. In reversing, the Court of Civil Appeals held that as there was no paying production from the premises at the end of the term, the mineral estate reverted to the grantors. To the same effect is the decision in Sellers v. Breidenbach, supra.

Just as the provisions in this lease have been held to deny a reasonable time to find a market after discovery of oil, so they have been construed to deny a reasonable time within which to pay "shut-in" royalty after the "shut-in" has taken place. This was explicitly held in Freeman v. Magnolia, supra, under similar facts, practically the only distinction being that in Freeman the discovery well had been brought in a few months prior to the end of the primary term. Gas was discovered in large quantities but none was used or sold off the premises. The "shut-in" royalty was not tendered for more than four months after the end of the primary term. The lease lapsed as a matter of law, there being no gas produced from the premises on the last day of the primary term, and the royalty not having been paid on or before that date. The lease could not be revived by an attempt to pay the royalty four months thereafter.

The provision in the lease for the payment of "shut-in" royalty is to provide for just that eventuality, namely, where gas has been discovered in paying quantities, but a market is lacking. This rule applies with equal force to the claim that the royalty payment could be tendered at any time within the period of one year after the well had been capped or "shut-in". Courts will not rewrite an oil and gas lease to provide that production, actual or contractual, will operate to extend its life when it has terminated by its provisions.

Gulf seeks to invoke the application for the "60-day-cease-to-produce clause" and says that, since the well did *in fact* produce gas in substantial quantities and was subsequently "shut-in", it therefore *ceased* to produce. Although this well was capable of producing in paying quantities, considerable gas having been flared and an undis-

closed number of barrels of condensate obtained, none was ever sold or used on or off the premises. Therefore, under the authorities cited above there was no production from the well within the meaning of the lease provisions. It follows, that since there had been no production, there could not be a cessation of production, and thus the 60-day clause is not available to the petitioner to extend the term of the lease or to delay the tender of the royalty payment. While petitioner discusses a number of cases under this point, and urges the matter with considerable force and logic, we are of the opinion that the question is foreclosed to the contrary. Actually the only case Gulf relies on as supporting its position is that of Shell Oil Co. v. Goodroe, 197 S.W. 2d 395 (wr. ref. n.r.e.). There the tender of "shut-in" royalty was not made before Shell had capped and shut-in the gas well. The case is distinguished, however, on several grounds. In the first place gas and condensate had been marketed from the well and the "shut-in" royalty payment was tendered within the 90-day period after production had ceased in compliance with the terms of the lease. In the second place, the royalty payment was not only tendered, but was accepted by the lessors and therefore the decision, we think, has little bearing on the problem presented here.

The last provision in Section 5 of the lease will not support petitioner's theory that it permitted payment of "shut-in" royalty at any time within a period of 60 days after the well was capped. Petitioner argues that the meaning of this provision was to allow a period of 60 days after the completion date of the well either to bring in actual production or pay royalty in lieu thereof or to abandon further operations on that well and commence additional operations on another. What we think petitioner is actually

saying is, that after the completion of the well, the provision grants additional time within which to determine whether the well is to be abandoned or not. Here there was no question at any time as to abandonment. It was capped only because of the lack of market facilities. In the usual course of development, operations normally would continue to make the well productive until the decision to abandon is made. The lease provision means what it says, namely, that in the event of abandonment the lessee has 60 days within which to decide on his further course. To adopt the meaning ascribed to it by Gulf would be to compel a strained and unnatural construction. To sum up, there was no production from the well during the term of the lease as extended by drilling operations; the "shut-in" royalty was not paid so as to bring about constructive or contractual production, and no provisions of the lease can be construed to furnish a further extension of the primary term or to make the tender of royalty in this case timely.

We now pass to the points raised by the lessor, Reid, in his application. He contends that the Court of Civil Appeals erred in remanding the case for another trial. To arrive at that result the Court of Civil Appeals reasons that when paragraph 2 and the last provision of paragraph 5 are considered together the latter provision should be construed to read: "If, at the expiration of the primary term, oil, gas or other mineral is not being produced from the land then covered hereby, but lessee is then engaged in operations for drilling or reworking operations on some part of the land hereunder, this lease shall not terminate so long as said operations shall continue." So the Court apparently thought that a fact question, not passed upon by the trial court, was raised as to whether or not the lessee, after capping the well, prosecuted "drilling opera-

tions" with due diligence measured by common-law standards and further that as to that fact the case had not been fully developed. The trial court had held that the lessee had at all times exercised due diligence in its efforts to provide a market and that these efforts culminated successfully in obtaining the pipe line company to lay and connect its gathering lines to the well. But these efforts, however, merely consisted of negotiations and not in any manual operations on the part of the lessee. In the light of settled rules we think the term "operations" cannot be extended to include a search on the part of lessee for a market or to secure a purchaser. If we accept, as we must, the conclusion that there was no production, therefore, no cessation of production and no abandonment, then in this case it necessarily follows that there was a gap between the completion of the well and production, and the lease terminated. We think, therefore, that the Court of Civil Appeals was in error in remanding the case for the determination of the fact question of diligence.

The last point raised by the lessor, Reid, is to the effect that the Court of Civil Appeals failed to render judgment in his favor as to 1/8th of the net value of the gas and condensate produced by the lessee. This concerns the question as to what credits, if any, are to be allowed to the lessee in equity for the lessor's proportionate part of the expenses incurred by lessee in obtaining production. Lessor's contention is that he became a tenant in common with Gulf when his lease expired and therefore he is proportionately liable for maintenance and marketing expenses from the time that relationship began, but that he is not to be held for any part of the costs of drilling operations and the completion of the well in the first place. This point has not been passed upon by either the trial court

or the Court of Civil Appeals, nor is the point briefed here. We therefore concur in the remand to the trial court, but only for the purposes of determining this question.

The judgment of the Court of Civil Appeals is affirmed.

/s/ FRANK P. CULVER, JR.

Frank P. Culver, Jr.
Associate Justice

Opinion delivered:
March 23, 1960

## CLERK'S CERTIFICATE

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing eight (8) pages contain a true and correct copy of the OPINION delivered by the Supreme Court of Texas in Cause No. A-7343, styled Gulf Oil Corporation vs. E. L. Reid, as the original of the same appears on file and of record in this office.

IN TESTIMONY WHEREOF witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 6th day of April, 1960.

GEO. H. TEMPLIN
Clerk of the Supreme Court
of Texas.

(SEAL)

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FILED
MAY 25 1960
JAMES R. BROWNING, Cle

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 340

J. VIRGIL SCOTT, ET AL AND PAUL J. ROGERS, ET AL,
*Petitioners,*

v.

UNION PRODUCING COMPANY, ET AL,
*Respondents.*

## PETITIONERS' REPLY TO RESPONDENTS' SUPPLEMENTAL REPLY

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## PETITIONERS' REPLY TO RESPONDENTS' SUPPLEMENTAL REPLY

*May It Please The Court:*

Petitioners respectfully request leave of this Honorable Court to file a brief argument in response to Respondents' supplemental reply brief.

Initially Petitioners wish to point out that the ground urged in the supplemental reply was also argued at length in the first reply. Thus, nothing new or novel is suggested. Respondents' only point in their supplemental reply is that in the case of *Gulf Oil Corporation* v. *Reid*, the Supreme Court of Texas has held for the third time that *leases* expire under the term of the *particular shut-in royalty clauses* there involved unless the payment of shut-in royalties is made before the end of the primary term of the leases.

Petitioners respectfully submit that the point of law established by the Texas Supreme Court in the three cases

cited by Respondents is clearly inapplicable to the case at bar. The shut-in royalty clauses were virtually identical in all three cases, and this Honorable Court will observe that in both of the two later cases following *Freeman* v. *Magnolia Petroleum Co.*, 141 Tex. 274, 171 S.W. 2d 339, the Texas Supreme Court has very carefully limited its holdings to the terms of *"this"* shut-in royalty clause. On the other hand, the lease provision in this case expressly permits the payment of shut-in royalties at the end of each quarter. Such payments were made (R. 125, 129, 183). The Texas Courts have held that where the lease provision expressly defines the period of time within which the royalties may be paid, as in this case, payment within that period although after the end of the primary term extends the lease. *Union Oil Co. of California* v. *Ogden*, 278 S.W. 2d 246 (Tex. Civ. App. err, refd. n.r.e.).

While the *Ogden* case is a complete answer to the cases cited by Respondents, Petitioners' basic position is that by modification, the lease provision on shut-in payments is read into and became a part of the term interest grants. This is the question squarely presented to the Supreme Court of Texas in *Archer County* v. *Webb*, which is pending on the docket of that Court. If the lease provision is read into the term deeds, all of it *including the time of payment* will become a part thereof.

As Respondents point out, neither the trial court nor the Court of Appeals for the Fifth Circuit passed upon the ground raised in the supplemental reply. Petitioners respectfully suggest that this petition for writ of certiorari should not be denied on a question of local law not considered by the lower courts.

The Supreme Court of Texas has granted a writ of error in *Archer County* v. *Webb*, as we had previously advised the Court. The case was submitted on oral argument on February 17, 1960, and is being considered by that Court

at this time. Petitioners again request that final determination of this cause be deferred until the Supreme Court of Texas has handed down its decision in *Archer County* v. *Webb*.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of May, 1960, copies of the foregoing reply were served upon all counsel of record for respondents herein, and upon Mr. W. S. Stovall.

.....